No. 89-442

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALEXIA ANDERSON, ET AL.,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, ET AL.,

Respondents.

BRIEF OF GLENDA BRELAND, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 7

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY THIS COURT OF THE FOURTH CIRCUIT'S AFFIRMANCE OF THE UNIQUE BRELAND ET AL. CLASS SETTLEMENT BETWEEN DALKON SHIELD CLAIMANTS AND AETNA CASUALTY & SURETY CO. IN LITIGATION THAT WAS "INTERDEPENDENT" WITH THE A.H. ROBINS CO. CHAPTER 11 PLAN WHICH, IN TURN, WAS BASED ON THE PREMISE THAT TORT CLAIMANTS WOULD BE FULLY COMPENSATED. NOR IS THERE ANY CONFLICT AMONG CIRCUITS OR WITH DECISIONS OF THIS COURT ARISING FROM PETITIONERS' **HYPOTHETICAL** QUESTIONS PRESENTED FOR REVIEW 7

A. BECAUSE PETITIONERS DO NOT SEEK REVIEW OF FINDINGS THAT (1) ALL CLASS MEMBERS WILL BE FULLY COMPENSATED FROM TRUST FUNDS ESTABLISHED UNDER THE ROBINS CO. PLAN, AND (2) THE AMOUNT PAID BY AETNA IN THE *BRELAND* CLASS SETTLEMENT IS A FAIR AND SIGNIFICANT CONTRIBUTION TO THE FUNDING OF THIS TRUST, PETITIONERS ARE SEEKING REVIEW OF HYPOTHETICAL ISSUES ON BEHALF OF FULLY COMPENSATED CLAIMANTS 9

Page

B. APART FROM THE UNCHALLENGED PROVISION FOR FULL COMPENSATION IN THE CLASS SETTLEMENT AND UNDER THE PLAN, THE QUESTION – WHETHER A FEDERAL COURT MAY CERTIFY A NATIONWIDE NON-OPT OUT CLASS OF TORT CLAIMANTS UNDER FED. R. CIV. P. 23(b)(1)(A) (WHICH IS THE ONLY RULE 23(b)(1) PROVISION CHALLENGED BY PETITIONERS ON CERTIORARI) – IS ITSELF ADVISORY IN LIGHT OF THE DISTRICT COURT'S UNCHALLENGED RULE 23(b)(1)(B) CERTIFICATION, AN ISSUE THAT WAS NOT REACHED ON APPEAL. IN ANY EVENT, THE QUESTION OF COMPLIANCE WITH 23(b)(1)(A) AS DECIDED BY THE CIRCUIT COURT, PRESENTS NO CONFLICT AMONG THE CIRCUITS NOR ANY DEPARTURE FROM ACCEPTED PRACTICE 11

C. SIMILARLY, THE QUESTION – WHETHER THE DENIAL OF OPT-OUT RIGHTS CONFLICTS WITH SHUTTS DUE PROCESS REQUIREMENTS FOR CLASS ACTIONS – RAISES AN EXTRANEOUS ISSUE NOT DECIDED BELOW. THE CIRCUIT COURT HELD THAT DUE PROCESS RIGHTS WERE ACTUALLY SATISFIED FOR CLASS MEMBERS IN THE NON-OPT OUT CLASS BECAUSE THEY STILL RETAINED THE RIGHT TO HAVE JURY TRIALS, WITH THEIR OWN LAWYERS, IN THE APPROPRIATE FORUM OF THEIR

TABLE OF CONTENTS – *(Continued)*

Page

CHOICE FOR THE ADJUDICATION OF THEIR INDIVIDUAL CLAIMS TO RECOVER FULL COMPENSATION. MOREOVER, EVEN THE QUESTION RAISED (WHICH WAS BASED ON ERRONEOUS PREMISES THAT CLAIMANTS LOST THEIR RIGHTS TO CHOOSE THEIR OWN LAWYER AND FORUM TO LITIGATE INDIVIDUAL CLAIMS) PRESENTS NO CONFLICT WITH DUE PROCESS DECISIONS OF THIS COURT 14

II. THE HOLDINGS OF THE FOURTH CIRCUIT THAT THE CERTIFIED CLASS SATISFIED PROCEDURAL AND DUE PROCESS STANDARDS WERE BASED EXCLUSIVELY ON FACTUAL CONSIDERATIONS. PETITIONERS' EFFORTS IN SEEKING ADVISORY OPINIONS ON HYPOTHETICAL OR NON-DISPOSITIVE QUESTIONS SERVES ONLY TO PROTRACT THE RESOLUTION OF THE CLAIMS OF THE CLASS (THE VAST MAJORITY OF WHOM SUPPORTED THE CLASS SETTLEMENT, VOTED IN FAVOR OF THE INTERDEPENDENT ROBINS CO. PLAN, AND ARE AWAITING COMPENSATION), AND UNDULY BURDENS THE PARTIES AND THIS COURT 17

CONCLUSION 19

TABLE OF CITATIONS

Page

A.H. Robins Co. v. Piccinin, 788 F.2d 944 (4th Cir.) *cert. denied* 479 U.S. 876 (1986) 2

In Re A.H. Robins Co. (Oberg), 828 F.2d 1023 (4th Cir. 1987), *cert. denied* 108 S.Ct. 1246 (1988) 2

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 17

Thorpe v. Housing Authority of City of Durham N.C, 383 U.S. 268 (1969) quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945) 17

Authorities

Fed.R.Civ.P. 23(b)(1)(A) 11

INTRODUCTION

Representatives of a plaintiff class in excess of 300,000 Dalkon Shield IUD claimants commenced by Glenda Breland, et al. against The Aetna Casualty & Surety Co. ["Aetna"] oppose the granting of a writ of certiorari in this case. The class of tort claimants will be fully compensated both individually and collectively through Trust Funds created under the Plan of Reorganization which was confirmed in Chapter 11 Bankruptcy Proceedings involving the A.H. Robins Co. ["Robins"] according to court findings entered after extensive hearings and affirmed on appeal. Aetna, as part of the *Breland* class settlement, will be contributing significant cash and insurance sums to these trust funds. Some 529 claimants represented by six lawfirms have petitioned for certiorari on the narrow issue that notwithstanding judicial findings of full compensation for their claims which they do not now challenge, and notwithstanding judicial findings that the amount being paid by Aetna in the *Breland* class settlement is fair and adequate for the class which they do not now contest, a non-opt out *Breland* settlement class nevertheless violates Rule 23 and due process standards.

Class representatives are seven women on behalf of a comprehensive class of Dalkon Shield IUD claimants against Aetna the insurer for Robins, manufacturer of an intrauterine device known as the Dalkon Shield. This case, originally commenced in the United States District Court for the District of Minnesota on April 9, 1986, was transferred on April 28, 1986 to the Eastern District of Virginia which also was the forum presiding over related Dalkon Shield tort claims against Robins, then engaged in Chapter 11 Bankruptcy proceedings.[1]

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1. The District Court and the Bankruptcy Court in the Eastern District of Virginia worked jointly in the Chapter 11 Proceedings, with the District Court reserving jurisdiction over all tort claims, and delegating to the Bankruptcy Court all non-tort matters.

The bankruptcy stay against litigation was extended to all Dalkon Shield Claims, whether or not Robins Co. was included as a defendant. Except for *Breland*, permission by claimants to sue Aetna was uniformly denied because of the interdependent nature of such litigation with the pending Chapter 11 proceedings. *A.H. Robins Co. v. Piccinin,* 788 F.2d 944 (4th Cir.) cert. denied 479 U.S. 876 (1986); *In Re A.H. Robins Co. (Oberg),* 828 F.2d 1023 (4th Cir. 1987), *cert. denied,* 108 S.Ct. 1246 (1988).

Aetna's liability in *Breland* was predicated on various theories including conspiracy with A.H. Robins Co. and others, RICO violations, illegal settlement of insurance coverage litigation as well as theories of negligence, breach of warranty, and strict liability for its alleged participation with A.H. Robins Co. in the marketing of a defective product. Plaintiffs moved for class certification. Aetna supported the motion and stipulated that if a class were certified and if Aetna were found liable on the common issues applicable to all class members, Aetna would agree to be bound by the determinations of causation and the amount of damages that would be assessed in the process of resolving the individual claims against Robins in the bankruptcy proceeding. (146a). On December 29, 1986, the District Court conditionally certified two subclasses ("A" and "B") against Aetna as requested in the plaintiffs' Amended Complaint and Motion For Class Certification. 134a-135a. As modified slightly in the Order of April 12, 1988 which finalized the class ruling, 136a-137a, the subclasses were defined as follows:

> **Class A:** All those individuals who have complied, or are deemed to have complied by the demonstration of excusable neglect, with orders of the Federal District Court for the Eastern District of Virginia governing the filing of proofs of claim [in the Robins Co. Proceedings]

and questionnaires noting the use of the Dalkon Shield.

Class B: All other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so and are not deemed to have done so.

Extensive discovery was conducted by *Breland* class counsel against Aetna, as described in the Courts' Opinions. 85a-87a, 169a-170a.

To facilitate the establishment of a Plan in the Robins Co. Proceedings, the District Court conducted a lengthy, well structured week-long hearing in November 1987 to estimate the aggregate funds necessary to fully compensate all eligible Dalkon Shield claimants. 21a-22a, 165a. Robins and all Creditors Committees, including the Dalkon Shield Claimants' Committee, as well as all interested parties, including Aetna, were permitted to participate in the hearing and to submit written materials. Subsequent to the hearing, the court determined that the sum of $2.475 billion payable over a reasonable period of time (22a) would be sufficient to fully compensate all present and future Dalkon Shield claims and related expenses.

Following this determination for full payment of tort claimants in the aggregate, Robins conducted merger negotiations with various companies and *Breland* class counsel discussed class settlement possibilities with Aetna. 166a. In February, 1988 American Home Products Co. [AHP] consummated a merger agreement with Robins contemporaneously and interdependent with a *Breland* class settlement agreement. 166a. The Robins/AHP merger agreement which was incorporated as a central feature of the proposed Robins Plan of Reorganization subject to court approval, provided for the creation of a fund in an amount necessary to satisfy the District Court's estimate of $2.475 billion dollars for full

compensation of Dalkon Shield claimants. The Plan also provided for an injunction barring Dalkon Shield claimants from suing certain third parties, e.g. corporate officers, et al., but not including Aetna.

The interdependent *Breland* class settlement provided that Aetna would contribute $425 million in cash and insurance to compensate Class A and Class B members as follows 26a, 151a-152a:

> 1. $75 million dollars to be contributed to the Robins Trust Fund established to fully compensate timely-filed Dalkon Shield Claims [Class A].
>
> 2. $250 million dollars of excess insurance coverage [Primary Excess Policy] to compensate any claims of Class A members over the aggregate Trust amount including interest. Thus this insurance would cover miscalculations by the Trust Administrator in paying out tort claims from a funded Trust that was expected to fully compensate all claims.
>
> 3. $100 million dollars of insurance [two $50 million dollar Outlier Policies] to compensate Class B members.

Because the *Breland* settlement, if approved, would eliminate any class action trial on common issues concerning Aetna's possible joint and several liability, Aetna agreed, and the settlement and Plan further provided with respect to individual claims that Aetna would be bound by the disposition of individual claims of class members pursued and determined through the Claims Resolution Facility ["CRF"] under the Plan. 26a. As part of the options expressly available to eligible class members to resolve individual claims, the CRF assured claimants of rights to a jury trial, with counsel of their own choice, in any appropriate forum of their choice, with all claims and defenses available to both sides. 27a,

73a, CRF Paragraph E 5. The defendant in such trials is required to be the Trust and not Robins or its Successor. (Id.).

After settlements of both *Breland* and the Chapter 11 Proceeding were reached subject to court approval, the court scheduled a class certification argument, a settlement fairness hearing, and a Plan Confirmation hearing. The advocate for objecting parties who vigorously opposed class certification without opt out rights for claimants, explained at argument that he would support the resolution of *Breland* only if claimants were allowed to opt out for a separate jury trial against Aetna where the claimant, after exhaustion of preliminary CRF options, could also join the Trust in jury trial proceedings. Thus, if opt-outs were permitted in the *Breland* settlement for Class A claimants who also had independent rights to pursue full compensation against the Trust, they would be expected to join the Trust to obtain full rights to recover on their claims. 154a-155a. Such routine joinder of the Trust in jury trials by any Class A member opt-outs, if permitted, would naturally result in significant increases of Trust Administrative expenses not contemplated when the court determined what level of Trust funding would be adequate to fully compensate all tort claimants. 155a. On the basis of the unique circumstances presented, the District Court found that the *Breland* settlement class independently satisfied Rule 23(b)(1)(A) and (B) requirements (153a-155a), and certified Class A as a non-optout class, and Class B as an opt-out class for compensatory damages only. 136a-137a. Subsequently, after notice and a fairness hearing, the court "approved the settlement over Petitioners strenuous objections, as to both the absence of an opt out and the adequacy of the settlement. 160a-177a." Pet. 11. The Fourth Circuit affirmed the *Breland* class certification and settlement approval in a

comprehensive opinion (1a-132a) and also affirmed the Plan Confirmation on the same day. 880 F2d 694 (4th Cir. 1989).

Petitioners filed for certiorari review in *Breland* sub nom. Alexia *Anderson* et al, Petitioners, limited solely to the propriety of a non-opt out class for Class A members under Rule 23(b)(1)(A) and due process standards. Many of the same Petitioners among others also filed for certiorari of the Plan Confirmation decision sub nom. Rosemary *Menard-Sanford,* Petitioners, No. 89-441. Petitioners expressly do not seek review of the level of funding of the Trust or the fairness of the Plan which are expressly designed and have been judicially found to fully compensate Dalkon Shield claimants, 84a, (See related Menard-Sanford Certiorari Petition No. 89-441 1-2), or of the amount contributed by Aetna in cash and insurance in the *Breland* settlement to help fund and insure the Trust (Pet. 3, 10), or of the approval of the settlement for Class B members. Pet. 3 n. 1. Nor do Petitioners seek review of the mandatory class certification and settlement approval for the resolution of the insurance coverage settlement controversy in the *Breland* amended complaint (Pet. 6 n. 3) or any other holding of the Fourth Circuit in its affirmance of the approval of the *Breland* Settlement. Pet. 3.

REASONS FOR DENYING THE WRIT

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY THIS COURT OF THE FOURTH CIRCUIT'S AFFIRMANCE OF THE UNIQUE *BRELAND* ET AL. CLASS SETTLEMENT BETWEEN DALKON SHIELD CLAIMANTS AND AETNA CASUALTY & SURETY CO. IN LITIGATION THAT WAS "INTERDEPENDENT" WITH THE A.H. ROBINS CO. CHAPTER 11 PLAN WHICH, IN TURN, WAS BASED ON THE PREMISE THAT TORT CLAIMANTS WOULD BE FULLY COMPENSATED. NOR IS THERE ANY CONFLICT AMONG CIRCUITS OR WITH DECISIONS OF THIS COURT ARISING FROM PETITIONERS' *HYPOTHETICAL* QUESTIONS PRESENTED FOR REVIEW.

For multiple reasons, the District Court in certifying *Breland* as a class action, approving the class settlement, and confirming the Robins Co. Plan, and the Fourth Circuit in affirming both class decisions as well as the Plan confirmation, recognized that under the unique and complex facts and circumstances involved[2] the settlement of the *Breland* class action was interdependent with the creation and confirmation of an acceptable A.H. Robins Company Reorganization Plan. The Fourth Circuit in reviewing the District Court's exercise of discretion, held that the AHP proposed merger contemplated that a fund of $2.475 million for the full satisfaction of Dalkon Shield claims would be established with "some contribution from Aetna" and it was essential "that the negotiations for settlement of the suit of the *Breland* plaintiffs and of the Claimants' Committee had to be merged into a comprehensive procedure for the liquidation of all Dalkon Shield claims against Robins and Aetna." 24a-25a.

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2. These are not detailed here but are fully summarized in the supporting opinions of the District Court and the Fourth Circuit.

> "It is important to recognize that this case is closely tied in with the bankruptcy of Robins. . . . **The Plan of Reorganization and the *Breland* settlement are interdependent. Failure of approval of either the Plan of Reorganization or the *Breland* settlement would derail hopelessly the carefully negotiated and crafted Plan and Settlement and leave the Dalkon Shield claimants to the vagaries, expenses and delay of further extended litigation."**
>
> 84a-85a (emphasis added)

The District Court similarly ruled that "Aetna's participation is unquestionably an integral aspect of the Debtor's Plan of Reorganization." 145a-146a

Petitioners do not assert that this case poses any special or important reasons for review by this Court, apart from their argument that the affirmance of a non-opt out class purportedly conflicts with circuit and Supreme Court decisions. Nor do petitioners further challenge or seek review of any of the findings or conclusions quoted above. Under all the circumstances, it is manifest that there are no special or important reasons for review by this Court of the unique circumstances under which the courts below have affirmed a class settlement that was expressly found to be interdependent with the Robins Plan.

A. BECAUSE PETITIONERS DO NOT SEEK REVIEW OF FINDINGS THAT (1) ALL CLASS MEMBERS WILL BE FULLY COMPENSATED FROM TRUST FUNDS ESTABLISHED UNDER THE ROBINS CO. PLAN, AND (2) THE AMOUNT PAID BY AETNA IN THE *BRELAND* CLASS SETTLEMENT IS A FAIR AND SIGNIFICANT CONTRIBUTION TO THE FUNDING OF THIS TRUST, PETITIONERS ARE SEEKING REVIEW OF HYPOTHETICAL ISSUES ON BEHALF OF FULLY COMPENSATED CLAIMANTS.

Aetna's contribution of cash and insurance to the Trust Fund, if approved, was described by the District Court as **"an indispensable part** of and will be distributed directly through the Dalkon Shield Claimants' Trust established pursuant to the present Robins' Plan . . . ." 151a (emphasis added). The District Court went on to say that "the Trust will be established and sufficiently funded by contributions by American Home Products and part of the proceeds of the proposed Aetna class settlement in an amount which satisfies the Court will be sufficient to compensate present and future Dalkon Shield claimants." 153a-154a. The Fourth Circuit agreed:

> "The Plan of Reorganization contemplated the creation of a Trust Fund to consist of $2.475 billion, to be funded primarily by payments made by American Home in connection with its acquisition by merger of Robins **and by contributions of Aetna."** 25a-26a (emphasis added)
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> * * *
>
> "The Robins Plan of Reorganization and the *Breland* settlement are intended to provide **full payment** of all compensatory damages suffered by all Dalkon

Shield claimants who have properly filed claims." 84a (emphasis added)

* * *

"Further, the settlement, coupled with that offered in the Robins Reorganization plan, **assured every *Breland* plaintiff of full payment of her proven claim, with an added contingent provision supplied by Aetna to protect against any possible deficiency in the Trust.** 90a-91a (emphasis added)

The sole question raised by Petitioners is whether the certification of a non-opt out class against Aetna for Class A members who will otherwise be fully compensated under the Trust which will be funded and insured in part by Aetna with contributions found sufficient under all the circumstances, nevertheless violates Rule 23 and due process standards. (Pet. 3) Petitioners assert that the ruling affirming such a non-opt out class by the Fourth Circuit conflicts with decisions of other circuits and with those of this Court.

The questions raised are purely hypothetical in light of the unchallenged full compensation that Class A members will receive from the Trust which is funded in significant part by Aetna contributions of cash and insurance that have been found fair and adequate for Class A members in unchallenged findings approving the *Breland* class settlement.[3] In any event, the questions raised present no conflict with decisions of other circuits or with this Court.

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3. Pet. 3: "In the court of appeals petitioners also challenged the validity of the district court's approval of the settlement of this class action, but in this Court they seek only to overturn the rulings precluding them from opting out and proceeding on their own against . . . Aetna. . . ."; Pet. 10: "The size of Aetna's [settlement] contribution is not at issue here."

B. APART FROM THE UNCHALLENGED PROVISION FOR FULL COMPENSATION IN THE CLASS SETTLEMENT AND UNDER THE PLAN, THE QUESTION WHETHER A FEDERAL COURT MAY CERTIFY A NATIONWIDE NON-OPT OUT CLASS OF TORT CLAIMANTS UNDER FED. R. CIV. P. 23(b)(1)(A) (WHICH IS THE ONLY RULE 23(b)(1) PROVISION CHALLENGED BY PETITIONERS ON CERTIORARI) – IS ITSELF ADVISORY IN LIGHT OF THE DISTRICT COURT'S UNCHALLENGED RULE 23(b)(1)(B) CERTIFICATION, AN ISSUE THAT WAS NOT REACHED ON APPEAL. IN ANY EVENT, THE QUESTION OF COMPLIANCE WITH 23(b)(1)(A) AS DECIDED BY THE CIRCUIT COURT, PRESENTS NO CONFLICT AMONG THE CIRCUITS NOR ANY DEPARTURE FROM ACCEPTED PRACTICE.

The District Court certified *Breland* Class A under Rule 23(b)(1). 156a In its Opinion certifying the class, the District Court separately discussed and made different findings to support upholding the class independently under 23(b)(1)(A) and (B). Thus the court, after discussing the individual circumstances involved concluded consistent with (b)(1)(A) criteria that there was a risk of incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others. 153a. Similarly, after discussing other relevant particular circumstances involved, the court concluded independently and consistent with (b)(1)(B) criteria: "Under these circumstances, opt-out rights for Class A members **(apart from creating the likelihood of inconsistent verdicts against Aetna) would severely impede the interests of other class members as a practical matter.**" 153a-155a (emphasis added)

The Fourth Circuit held that the requirements of 23(b)(1)(A) were satisfied and did not reach or discuss

23(b)(1)(B) compliance. If this case were accepted for certiorari, reversal could only occur if neither subsection (A) or (B) of the Rule were satisfied. Because Petitioners only challenge compliance with 23(b)(1)(A) before this Court, that question alone is itself non-dispositive in the absence of consideration of alternative compliance with 23(b)(1)(B) which itself sustains the result below and which Petitioners do not challenge in this Court.

In any event, the District Court held and the Fourth Circuit affirmed the non-opt out *Breland* class because it satisfied 23(b)(1)(A) criteria. The District Court held:

> "A single adjudication is required because all of the claims against Aetna, focus primarily on Aetna's conduct vis-a-vis its relationship with its insured. Multiple adjudications of the identical factual and legal issues thus implicated could yield incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others." 153a.

Said the Fourth Circuit in affirming:

> "The theory on which the *Breland* plaintiffs premise this right against Aetna has as its basis that Aetna **went beyond its duty as insurance carrier** for Robins and became an 'active participant in all stages of the development, testing, promoting and marketing of the product [Dalkon Shield]. . . .' [67a-68a]
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> * * *
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> "Whether Aetna is liable as a joint tortfeasor in Dalkon Shield litigation will depend on an analysis of a common nucleus of fact that will not vary in the individual cases. . . . Absent class certification, the risk of conflicting decisions on that issue could be anticipated in practically every individual case against Aetna that would be tried. **That threat of**

conflicting legal standards and results could well create a chaotic situation in this case. [68a-69a]

* * *

"[T]he action qualifies under subsection (b)(1)(A) as well as (3). . . . Further, **the resolution of this [overshadowing] issue [of Aetna's liability as a joint tortfeasor], if required to be made in the thousands of individual suits in different courts, would involve the risk of varying and contradictory legal decisions on what was precisely the same factual record. The result would be chaotic. This is a situation which would unquestionably qualify under (b)(1)(A).**" 81a (emphasis added)

Thus, the Fourth Circuit found that the risk of incompatible and contradictory standards as would result here from individual suits in contrast to a unitary adjudication, satisfies 23(b)(1)(A) criteria. This holding is directly in compliance with 23(b)(1)(A) requirements and is fully consistent with decisions of other circuits.

Petitioners misstate the Fourth Circuit's holding as one that affirms a (b)(1)(A) class certification simply on the possibility of Aetna "winning some cases and losing others" (Pet. 11). Based on this misstated holding, Petitioners argue that such possibility of "inconsistent results" has been generally rejected by the other circuits, citing cases. (Pet. 15). On proper analysis of its holdings, the Fourth Circuit is in accord with the generally recognized view that Rule 23(b)(1)(A) is not satisfied when separate adjudications have consequences that some plaintiffs may recover money damages and others may not. Rather, the Fourth Circuit properly focused on the inherent risk of inconsistent and contradictory standards that would result from separate Dalkon Shield suits that would adjudicate Aetna's duties of defense, confidentiality, and loyalty to Robins, its

insured, and to others, in affirming class certification under clear standards of 23(b)(1)(A).

C. SIMILARLY, THE QUESTION – WHETHER THE DENIAL OF OPT-OUT RIGHTS CONFLICTS WITH *SHUTTS* DUE PROCESS REQUIREMENTS FOR CLASS ACTIONS – RAISES AN EXTRANEOUS ISSUE NOT DECIDED BELOW. THE CIRCUIT COURT HELD THAT DUE PROCESS RIGHTS WERE ACTUALLY SATISFIED FOR CLASS MEMBERS IN THE NON-OPT OUT CLASS BECAUSE THEY STILL RETAINED THE RIGHT TO HAVE JURY TRIALS, WITH THEIR OWN LAWYERS, IN THE APPROPRIATE FORUM OF THEIR CHOICE FOR THE ADJUDICATION OF THEIR INDIVIDUAL CLAIMS TO RECOVER FULL COMPENSATION. MOREOVER, EVEN THE QUESTION RAISED (WHICH WAS BASED ON ERRONEOUS PREMISES THAT CLAIMANTS LOST THEIR RIGHTS TO CHOOSE THEIR OWN LAWYER AND FORUM TO LITIGATE INDIVIDUAL CLAIMS) PRESENTS NO CONFLICT WITH DUE PROCESS DECISIONS OF THIS COURT.

In response to Petitioners' argument that *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) "proscribes any class certification, which does not provide the class members with the right to opt out" (74a), the Fourth Circuit held, that even if *Shutts* required opt-out rights in order to satisfy due process standards in all class actions, all of the due process standards that are afforded by opt-out rights are, in fact, actually afforded in the class certified here, despite the absence of formal opt-out rights which would not afford any additional due process rights. Thus, the Circuit Court concluded in the unique circumstances involved, that however the requirements of *Shutts* might be applied in this case, they were satisfied. Said the Fourth Circuit:

> "Fortunately, however, ***Shutts*** – **if taken as requiring an opt-out provision in any class certification,** and assuming without deciding, that opt-outs could not be validated here under the *Mathews v. Eldridge* standard – **is satisfied in this case.** . . . In this case the Trust created by the parties for the resolution of all Class A claims on individual causation and damages does not in express terms include an opt-out provision, but in effect it does. **The Plan gives every such class member the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.**
>
> * * *
>
> "Certainly, the procedure provided every class member here fairly meets the standard of 'fundamental fairness' which due process demands. It follows that *Shutts,* if applicable, is fully complied with in this case." 75a-76a (emphasis added)

In essence the Fourth Circuit recognized that while the unique class settlement in combination with the Plan fairly resolved aggregate compensation of all claims without opt-out rights for Class A members, the procedures for resolving individual recovery allocations of this sufficiently large Trust included every due process protection afforded to individual litigants.

Because the Fourth Circuit assumed without deciding *Shutts'* applicability to this case but held, rather, that the non-opt out class certified below satisfied actual due process standards as they applied to the myriad of unique circumstances involved here, Petitioners' question whether *Shutts'* due process requirements were violated by the absence of opt-out rights for Class A members is an extraneous one at best.

The primary grounds set forth by Petitioners in support of their argument that due process standards were violated because of the absence of opt-out rights are based on a misperception of the procedures afforded to Class A members in the adjudication of their individual claims under the Plan. Thus, Petitioners' bemoan the fact that Class A members are forced to give up personal adjudication of individual claims because they will be represented by class counsel (rather than counsel of their own choice) who will adjudicate their individual claims on a class basis, and they are forced to litigate in the Eastern District of Virginia rather than in a forum of their own choice. Petitioners' Questions Presented, No. 2, Pet. i, and 22, 23. Such alleged deprivation of rights is directly contrary to the rights preserved in the Claim Resolution Facility procedures and guaranteed to all claimants in their individual claims, namely the right to have a jury trial in any appropriate forum and with counsel of the claimant's choice. 27a, 73a. Because these central due process rights are erroneously perceived by Petitioners to be forfeited under the class certification and settlement decisions, Petitioners' due process objections generally disappear when the true circumstances are recognized.

II. THE HOLDINGS OF THE FOURTH CIRCUIT THAT THE CERTIFIED CLASS SATISFIED PROCEDURAL AND DUE PROCESS STANDARDS WERE BASED EXCLUSIVELY ON FACTUAL CONSIDERATIONS. PETITIONERS' EFFORTS IN SEEKING ADVISORY OPINIONS ON HYPOTHETICAL OR NON-DISPOSITIVE QUESTIONS SERVES ONLY TO PROTRACT THE RESOLUTION OF THE CLAIMS OF THE CLASS (THE VAST MAJORITY OF WHOM SUPPORTED THE CLASS SETTLEMENT, VOTED IN FAVOR OF THE INTERDEPENDENT ROBINS CO. PLAN, AND ARE AWAITING COMPENSATION), AND UNDULY BURDENS THE PARTIES AND THIS COURT.

In affirming the class certification, settlement approval, and the Plan Confirmation, the Fourth Circuit scrupulously reviewed the applicability of recognized legal standards to the highly unique facts and circumstances underlying the resolution of all present and future Dalkon Shield claims. Further review of these fact-specific rulings is inappropriate, because any ensuing precedent would probably be limited to the facts involved in the instant case.

Having chosen not to further challenge the estimation hearing procedures or the sufficiency findings related to the Trust fund being established to fully compensate all tort claimants, and having chosen not to seek further review of the class settlement approval or of the adequacy of the amount being paid by Aetna in the class settlement, Petitioners raise only hypothetical questions in their certiorari petition. This Court has held that it does not decide abstract hypothetical or contingent questions, or constitutional questions before they need to be decided. *Thorpe v. Housing Authority of City of Durham, N.C.*, 383 U.S. 268 (1969) quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Rice v. Sioux City Memorial Park Cemetery,*

349 U.S. 70 (1955). Yet that is precisely what Petitioners seek from this Court. Petitioners' contentions are seeking advisory review by this Court. In contrast, the Plan and class settlement provide unique benefits to the class not available in individual litigation, e.g. waiver of individual issues by Aetna relating to causation, extent of injuries, and amount of damages recoverable, together with generously afforded and sufficient due process protections in the CRF procedures for the resolution of individual claims. *Breland* class members overwhelmingly supported approval of the class settlement and have been awaiting compensation for a period spanning more than four years. Petitioners' pursuit of largely hypothetical questions not suitable for certiorari review serves, as a practical matter, unduly to delay proceedings and burden the Court and the parties.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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